Nos. 82-206 and 82-229

Office - Supreme Court, U.S.
FILED
OCT 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,
—v.—
CARL W. STOTTS, et al.,
Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,
—v.—
CARL W. STOTTS, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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October 27, 1983

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INTEREST OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national organization dedicated to achieving equal employment opportunities for Mexican Americans and other Americans of Hispanic heritage. MALDEF has pursued this objective in part by serving as counsel of record in employment discrimination actions. It has also presented its views, as *amicus curiae*, to the United States Courts regarding

employment discrimination issues of importance to Hispanics. The availability of the relief directed by the District Court in this case and challenged on this appeal is such an issue.

Hispanics, like blacks, endure the persistent effects of employment discrimination throughout the United States. Hispanics who aspire to the equality of employment opportunities guaranteed by Title VII of the Civil Rights Act of 1964 must have some assurance that gains in hiring and employment won through litigation will not be eradicated by an employer's response to developments unforeseen at the time of suit. In this case, the Court is called upon to review a district court decree that protects gains in minority hiring and promotion threatened by circumstances arising after entry of a consent decree settling a Title VII action. In light of the importance of this issue for the Hispanic community, MALDEF submits this brief urging affirmance of the decision below.[1]

INTRODUCTION

At issue on this appeal is the power of a federal district court to preserve legally mandated gains in the hiring and promotion of minorities, made pursuant to a judicially enforceable consent decree, when those gains will be substantially diminished by an employer's actions in response to circumstances unforeseen when the parties entered into the decree.

Two separate actions, one a Government pattern and practice suit initiated by the Department of Justice in 1974 and the other a private class action filed by Respondent Carl W. Stotts in 1977, were brought against the City of Memphis and its Fire Department (hereinafter collectively referred to as "the City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and related statutes. In both cases, the parties reached negotiated settlements. These settlements were embodied in consent decrees (the "1974 Decree" and the "1980 Decree", respectively) that commit the City to the goal of

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1 The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

achieving, within each job classification in the Fire Department, minority representation approximating the minority representation in the civilian labor force. Partial, but by no means complete, achievement of this goal had been attained by 1981 when an unforeseen change in the economic climate prompted the City to initiate a lay-off program. If implemented, this program would have substantially undone the gains in minority hiring and promotions that had been made under the decrees. After the program was announced, the private plaintiffs sought equitable relief solely to preserve the partial remedy already accomplished. The result was the preliminary injunction at issue here, which enjoins the City from applying its lay-off program to decrease the percentage of blacks in certain job classifications within the Fire Department.[2]

SUMMARY OF ARGUMENT

Under longstanding precedent, the district courts possess the authority to modify a consent decree in light of unforeseen circumstances that have arisen following its entry. This equitable power is properly exercised when, as here, a change in circumstances threatens to frustrate the remedial program set forth in the decree. The seniority-based layoffs proposed by the City of Memphis for its Fire Department would have reversed the progress made in hiring and promoting blacks into positions from which they had historically been excluded. The District Court, in a careful exercise of its equitable discretion, entered a preliminary injunction that preserved the status quo by preventing the City from reducing the percentage of blacks within each Fire Department rank pending a hearing on the merits. This limited relief falls squarely within the equitable power of the court to preserve the efficacy of the earlier remedial order.

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2 MALDEF joins in Respondents' argument that, because those white employees laid off due to the preliminary injunction were reinstated shortly thereafter, the case is now moot.

The relief ordered in the preliminary injunction is fully consistent with the broad remedial scope of Title VII. The preliminary injunction preserves the relief ordered in the consent decree, but imposes no additional burdens on defendants. Because the 1980 Decree was designed to eliminate the present effects of past discrimination, the preliminary injunction plainly falls within the authority of the courts under Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), to order all appropriate "affirmative action." Title VII relief, moreover, is not limited to adjudicated victims of discrimination; Petitioners' argument to the contrary is contradicted by the legislative history of Section 706(g) and by numerous decisions of the federal courts.

The preliminary injunction is not prohibited by Title VII even though it affects the expectations of white employees. The intrusion is minimal. Since *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), grants of permanent retroactive seniority have been widely available when necessary to fulfill the objectives of Title VII, even where employees enjoy seniority benefits under a bona fide seniority plan. The equitable relief ordered by the District Court was necessary to preserve the effectiveness of the remedy previously ordered and intrudes far less on the operation of seniority than does the remedy of full permanent retroactive seniority authorized in *Franks* and *Teamsters*.

Because the District Court neither abused its discretion nor exceeded its authority, its entry of the preliminary injunction should be affirmed.

ARGUMENT

I. THE DISTRICT COURT HAD THE POWER TO MODIFY THE 1980 DECREE AND PROPERLY EXERCISED THAT POWER

The Court of Appeals, in sustaining the District Court's preliminary injunction, ruled both that the relief was based on a proper construction of the 1980 Decree as written and, alternatively, that the injunction fell within the equitable power of a court to modify a consent decree in light of changed circumstances. Assuming that the preliminary injunction does in fact "modify" the original decree, the Court of Appeals was clearly correct in its ruling.

It is a principle of longstanding that a district court has the power to modify a consent decree in light of changed circumstances "to adapt its restraints to the needs of a new day." *United States v. Swift & Co.*, 286 U.S. 106, 113 (1932). As Justice Cardozo wrote for the Court: "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *Id.* at 114. This power is "inherent in the jurisdiction of the chancery," *id.*, and exists whether or not the decree expressly reserves to the court the authority to modify the decree, *id.*; *see Chrysler Corporation v. United States*, 316 U.S. 557, 567 (1942) (Frankfurter, J., dissenting). It is appropriately exercised where a change in circumstances prevents the decree from achieving the remedy agreed upon by the parties.

A district court's exercise of its power to modify a consent decree will be overturned only if entry of the modification amounts to an abuse of discretion. This Court, in *Chrysler Corporation v. United States*, defined the narrow scope of review as follows:

> The question is whether the change . . . amounted to an abuse of this power to modify. We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree.

316 U.S. at 562. Applying this test in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), the Court held that where a decree has failed to achieve its "principal objects," it is appropriate "to prescribe other, and if necessary more definitive, means to achieve the result." *Id.* at 251-52.[3] As noted in *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 n.7 (N.D. Ill. 1982), "If a plaintiff can show that modification of the decree is crucial to the effectuation of the purpose the decree was intended to achieve, then a grievous wrong would be perpetrated if the decree was not modified."

United States v. Armour & Co., 402 U.S. 673 (1971), relied upon by Petitioners, does not disturb these principles. In *Armour*, the Court held that construction of a consent decree must be conducted within the "four corners" of the decree. The opinion, however, did not purport to alter the standards applicable to requests for *modification* of a decree; to the contrary, the Court suggested that "if the Government believed that changed conditions warranted further relief [beyond that provided for in the original consent decree], it could have sought modification of the [decree] itself." *Id.* at 674-75 (citing *Chrysler Corporation v. United States*, *supra*). In addition, the Court observed that there "might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief de-

3 Citing *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932), the Firefighters Union suggests that modification of the 1980 Decree cannot be upheld unless changed circumstances have transformed the original decree into an "instrument of wrong." The *Swift* Court's insistence on a "clear showing of grievous wrong," 286 U.S. at 119, however, applies only to applications by parties seeking to *reduce* their obligations under a consent decree, not to requests for modification by the beneficiary of the decree's remedial program. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248-49 (1968). It is not the consent decree that constitutes the "wrong" for the beneficiary of the relief therein, but the prior practices that led to the injunctive provisions of the decree. When, in light of changed circumstances, the decree no longer effectively prevents the harm against which it was intended to guard, the question relevant to an application for modification is that identified in *Chrysler*: whether the proposed modification is needed to effectuate the goals embodied in the decree. *See United Shoe*, 391 U.S. at 249-51.

sirable to prevent the evils aimed at by the original complaint." 402 at U.S. at 681. More recently, this Court has reiterated that a party may petition for modification of a consent decree if it believes that changed circumstances warrant further relief. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233 n.8 (1975). *See also Environmental Defense Fund, Inc. v. Castle*, 636 F.2d 1229, 1240 (D.C. Cir. 1980) ("sound exercise of judicial discretion may require that terms of a consent decree be modified when there has been a significant change in the circumstances obtaining at the time the consent decree was entered"); *Luevano v. Campbell*, 93 F.R.D. 68, 92-93 (D.D.C. 1981) (court has power "to modify the obligations of the Consent Decree in order to further its purposes in light of unforeseen problems which may arise").

In the present case, it is plain that, to the extent (if any) that it modified the 1980 Decree, the District Court's preliminary injunction "served to effectuate" rather than "thwart" the objects of the original decree.

The "evil aimed at" in this Title VII action was the exclusion of blacks from all levels of the Memphis Fire Department. The 1980 Decree strikes at this evil by requiring progress in the hiring and promotion of blacks until their representation in the Memphis Fire Department approximates their representation in the civilian work force. By accepting the 1980 Decree, moreover, the plaintiffs agreed to forego pursuit of other relief, *e.g.*, back pay (beyond a $60,000 award provided in the settlement) and full retroactive seniority. The lay-offs proposed by the City would have effectively deprived plaintiffs of the benefit of their bargain in agreeing to the consent decree. *See, e.g., Kirke la Shelle Co. v. Armstrong*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933) (every contract contains "an implied covenant that neither party shall do anyting which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); Burton, *Breach of Contract and the Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980).

The goal of proportional representation had been achieved to only a limited degree when the City announced its intention

to lay-off members of the Department. All parties agree that the proposed lay-offs would have disproportionately affected black fire fighters and officers; progress in minority hiring and promotion would largely have been undone. Disproportionate numbers of blacks in supervisory positions such as lieutenant would have been reduced in rank, thereby negating the advances made in minority promotions under the 1980 Decree.[4] In addition, disproportionate numbers of blacks at the lowest rank would have been laid off, thereby diminishing overall black representation in the Department. As the Court of Appeals noted, "[T]he application of the lay-off policy to the job classifications selected by the City would have virtually destroyed the progress belatedly achieved through affirmative action. The City contracted in 1974 and 1980 to accomplish precisely that which the lay-offs would destroy: a substantial increase in the number of minorities in supervisory positions." 679 F.2d at 561. Had the City been allowed to proceed, the plaintiffs would have been deprived of the very remedy in exchange for which they gave up their right to pursue remedies of back pay and full retroactive seniority. *See* Burton, *supra*, 94 Harv. L. Rev. at 387.

Because the proposed lay-offs would have vitiated the intended effects of the 1980 Decree, the District Court, under the authorities cited above, properly exercised its equitable discretion to halt the proposed City action. The Court's preliminary injunction is carefully limited to avoid interference with the operation of the Memphis Fire Department and to minimize any infringement of the interests of other employees.[5] It does no more than prevent the City from reducing the percentage of

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4 The City acknowledges that, of 36 proposed demotions, 26 would have affected blacks. This disparity was most pronounced at the lieutenant rank, where 16 of 29 black lieutenants (55%) would have been demoted to driver or private, while only 1 of 211 white lieutenants (0.5%) would have been so affected. *See* Brief for Petitioners Memphis Fire Department *et al.* at 7 n.11.

5 Compared with the range of possiblities available to the District Court, the relief ordered was strikingly modest. The Court, for example, did not direct that the City, during its fiscal crisis, make continued progress

minorities in each job classification. While furthering the objectives of the 1980 Decree, the relief carefully accommodates the interests of all employees affected by the preliminary injunction. The District Court engaged in a sound exercise, not an abuse, of its equitable discretion.

The decisions in other employment discrimination cases further confirm the propriety of the District Court's action. Courts confronted with facts virtually identical to those presented here have modified consent decrees without hesitation to prevent eradication of gains in minority employment. *See Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded for a determination of mootness*, 103 S.Ct. 2076 (1983); *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) (consent decree pursuant to 42 U.S.C. §§ 1981, 1983).

Petitioners and various *amici* suggest that the District Court's action will deter settlement of other Title VII cases, since parties will be reluctant to agree to consent decrees that might be revised at some point in the future in light of unforeseen circumstances. This line of reasoning is unpersuasive.

As the precedents cited above establish, a court has power to modify a consent decree only in a manner that will advance the goals originally agreed to by the parties and comprehended by the decree. Modification in accordance with this standard does not disrupt the legitimate expectations of the parties; it merely ensures that unforeseen circumstances will not defeat a remedial program whose success was anticipated by both parties to the decree. This long-established equitable power must be regarded as a part of the informed expectations of litigating parties and their attorneys. Because affirmance of the decision below would represent no augmentation of the equitable power of a district court, there is no basis for apprehension that the prospects for settlement of other cases will be impaired.

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toward the goals set forth in the 1980 Decree. The preliminary injunction actually imposed *no* additional burdens on the City, since it did not compel the City to retain more members of the Fire Department than the City determined to be appropriate. The relief instead was a temporary, limited measure directed exclusively to preservation of the limited progress already achieved under the 1980 Decree.

II. TITLE VII MANDATES THE RELIEF AWARDED IN THE PRELIMINARY INJUNCTION

Petitioners and several *amici* also maintain that the preliminary injunction contravenes the provisions of Title VII. They argue that the relevant remedial provision of Title VII, Section 706(g), 42 U.S.C. § 2000e-5(g), prohibits the granting of any relief to persons who have not been adjudicated victims of discrimination prohibited by Title VII. They also argue that, even if Section 706(g) permits the award of certain types of relief to persons not adjudicated victims of discrimination, the preliminary injunction impermissibly granted a form of retroactive seniority which *is* limited to adjudicated victims of discrimination. These arguments find no support in the language or purpose of Title VII, and the relevant decisions of this Court argue strongly to the contrary.

A. Section 706(g) of Title VII Does Not Limit Relief to Adjudicated Victims of Discrimination

In enacting Title VII, "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("*Moody*") (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)). Congress intended that, through the exercise of this plenary authority, the courts would "fashion the most complete relief possible." 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)).

These broad equitable powers are granted by Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). Section 706(g) explicitly empowers the district courts to "order such affirmative action as may be appropriate." Affirmative action remedies have frequently included hiring and promotion goals for minority employees (such as those contained in the 1974 and 1980 Decrees), *see, e.g., Chisolm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1014 (5th Cir. 1980); *Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978), as well as awards of retroactive

seniority to prevailing class members, *see, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*"); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) ("*Franks*").

In fashioning the complete remedy required by Section 706(g), the district court must fulfill *two* objectives of Title VII. First, as Petitioners and the Department of Justice emphasize, the court must provide complete "make-whole" relief, so that identifiable victims of discrimination will be placed in the economic position they would have enjoyed in the absence of discrimination by the employer. *See, e.g., Franks*, 424 U.S. at 763; *Moody*, 422 U.S. at 418-19.

"Make-whole" relief, however, does not exhaust the reach of Title VII. There is a second goal. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364. Thus, the court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Teamsters*, 431 U.S. at 364 (quoting *Moody*, 422 U.S. at 418).[6]

Because eliminating the present effects of past discrimination is no less important an objective under Title VII than the providing sufficient "make-whole" relief, remedies under Section 706(g) have never been limited to adjudicated victims of the employer's discrimination. The twelve circuits are unanimous in upholding hiring and promotion goals not limited to adjudicated victims of discrimination, explicitly or implicitly because such remedies are necessary to eliminate the present effects of past discrimination.[7] As Judge Charles Clark explained in *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974):

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6 *See Berkman v. City of New York*, 705 F.2d 584, 596 (2d Cir. 1983) ("Affirmative relief is that designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief.").

7 *See, e.g., McKenzie v. Sawyer*, 684 F.2d 62 (D.C. Cir. 1982); *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert.*

> The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit.

Limiting relief under Section 706(g) to adjudicated victims of proven discrimination could only obstruct enforcement of Title VII. If an adjudication were required, it would be impossible to award class-wide relief under a consent decree; each plaintiff who seeks such relief would be forced to go to trial, despite the efforts by Congress and the Court to foster settlement of Title VII claims. *See, e.g., Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Even if an increase in the number of Title VII trials were desirable, the ability of the district courts to desegregate previously all-white work forces would depend on the fortuitous availability of all

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denied, 421 U.S. 910 (1975); *Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978); *EEOC v. American Telephone and Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1981); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979). Under *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), panels of the Eleventh Circuit remain bound by Fifth Circuit decisions rendered prior to October 1, 1981, such as *United States v. City of Alexandria*, *supra*.

persons who were victims of the employer's discriminatory practices. As the Third Circuit has observed, all of the victims of an employer's illegal practices are unlikely to be available; race-conscious remedies are therefore necessary "to counteract the effects of discriminatory practices upon the balance of sex and racial groups that would otherwise have obtained." *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 180 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) ("*AT&T*"); *accord*, *Baker v. City of Detroit*, 483 F. Supp. 930, 993-94 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983).

Both the 1980 Decree and the preliminary injunction at issue here fulfill these important objectives of Title VII. The Sixth Circuit held that the race-conscious employment goals in the decree were a reasonable means of ameliorating the present effects of past discrimination and of desegregating the Fire Department. 679 F.2d at 553-56. The preliminary injunction, by preserving for the successful class members the benefits of the consent decree until there is a hearing on the merits, equally serves those goals.[8]

Even though the 1980 Decree and the preliminary injunction are plainly the type of "affirmative action" mandated by Section 706(g), the Justice Department implausibly interprets the final sentence of Section 706(g) to prohibit an award of relief to any except proven victims of discrimination. This sentence provides that:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, *if such individual was refused* admission, suspended, or expelled, or was refused employment or advancement or

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8 Of course, to the extent that beneficiaries of the 1980 Decree and the preliminary injunction *were* victims of discrimination by the Fire Department, the relief serves the "make-whole" objective of Title VII as well.

> was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(Emphasis added.)

By its terms, this sentence does not apply to the relief ordered in the preliminary injunction. In exempting some members of the prevailing class from lay-offs, the preliminary injunction does not order "the hiring, reinstatement, or promotion" of any person. However, even if this sentence did apply to the preliminary injunction, it would not prohibit the relief ordered by the District Court.

No court has ever adopted the Justice Department's novel interpretation of Section 706(g), and this reading was explicitly rejected by the Third Circuit in *AT&T*. The statute prohibits the courts only from ordering the hiring, reinstatement, or promotion of an individual "if *such* individual was refused . . . employment or advancement or was suspended or discharged for any reason other than discrimination on account or race, color, religion, sex, or national origin . . . ." This language applies only to those persons who previously sought employment or promotion but had been rejected by the employer for nondiscriminatory reasons (*e.g.*, because they were unqualified); it makes no reference to persons who had not sought employment or promotion and thus does not prohibit their hiring under a remedial affirmative action plan.

Instead, the quoted language reflects Congress's intent that persons who had been refused employment or promotion (or who had been fired) for legitimate, nondiscriminatory reasons could not invoke the strong remedial provisions of Section 706(g) to obtain employment or promotion. *AT&T*, 556 F.2d at 176; 110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler in introducing this language); Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 438 (1966). In enacting Title VII, Congress did not intend to authorize hiring of unqualified employees. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). The 1980 Decree approved by the panel more than

complies with this limitation under Section 706(g) because it permits the City to deny employment to any person who is not qualified for the position. *See United States v. City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980); *AT&T*, 556 F.2d at 176.

In *AT&T*, the Third Circuit, after thoroughly canvassing the relevant legislative history, concluded that the interpretation now advocated by the Justice Department distorted congressional intent. 556 F.2d at 175-77. As the *AT&T* court noted, the section-by-section analysis in the 1964 House Report interpreted the initial House version of Section 706(g), H.R. 7152, 88th Cong., 1st Sess. § 707(e) (1963), as follows:

> *No order of the court may require* the admission or reinstatement of an individual as a member of the union or the hiring, reinstatement, or *promotion of an individual* as an employee or payment of any back pay *if the individual was refused* admission, suspended, or separated, or was refused employment or *advancement*, or was suspended or discharged *for cause*.

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (emphasis added). Like the final language of Section 706(g), this passage reflects only congressional concern that employers not be compelled to hire specific individuals who were unqualified or who were denied employment or promotion for nondiscriminatory reasons.

On the House floor, the proposed section was amended. The grounds on which an employer could refuse to hire or promote "such individual" claiming discrimination were expanded by substituting for the word "cause" the present language, "for any reason other than discrimination on account of race, color, religion, or national origin." *See* 110 Cong. Rec. 2567 (1964). The substitution of this language was designed to prevent plaintiffs pressing spurious claims of discrimination from arguing that an employer's legitimate reason for denying employment or promotion did not qualify as "cause". Representative Celler's explanation in introducing the amendment is authoritative:

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler). The concluding language of Section 706(g) is therefore concerned exclusively with defining a "violation of the act," *id.*, not with limiting the broad equitable powers granted by Title VII.

The progress of Section 706(g) in the Senate similarly affords no basis for distorting its language to prohibit race-conscious affirmative remedies. The interpretive memorandum offered by Senators Clark and Case stated, in a passage relied upon by Petitioners and their *amici*, that:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(e) [now Section 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin.

110 Cong. Rec. 7214 (1964). The passage demonstrates only the Senators' concern that employers be able to refuse employment or promotion to those employees considered unfit for the position without fear that their judgment would be overruled by the provisions of Title VII. It does not address (much less prohibit) the availability of affirmative remedies not restricted to individuals who have proven that they were victims of the employer's practices. Far more relevant is the statement of

Senator Humphrey, a sponsor of Title VII, that the statute was intended to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[9] 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

The legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 92d Cong., 2d Sess., 86 Stat. 103 (1972), *codified* (*as amended*) *at* 42 U.S.C. § 2000e *et seq.*, further demonstrates that Title VII remedies are not limited to adjudicated victims of discrimination. The section-by-section analysis of that Act provided by Senators Javits and Williams states that:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

118 Cong. Rec. 3460 (1972).

Congress was unquestionably aware of decisions ordering race-conscious affirmative action remedies. During the debates on the 1972 Act in the Senate, Senator Javits specifically defended the affirmative action remedy ordered in *United States v. Ironworkers, Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), and inserted a copy of the court's opinion in the Congressional Record. 118 Cong. Rec. 1671-75 (1972).[10]

Thus, the language and legislative history of Section 706(g) leave no doubt of the propriety of race-conscious relief that may benefit persons never adjudicated to have been victims of discrimination.

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9 In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court relied on this language in upholding a private employer's race-conscious affirmative action plan.

10 In *Ironworkers*, the Ninth Circuit ordered the union to apprentice "sufficient black applicants to overcome past discrimination" without regard to whether an applicant was a proven victim of discrimination. *See* 443 F.2d at 553.

B. The Relief Granted in the Preliminary Injunction Did Not Impermissibly Interfere with the Operation of a Seniority System

Petitioners and their *amici* apparently believe that, even if certain forms of race-conscious relief were authorized under Section 706(g), any race-conscious remedy that intrudes (even minimally) on the seniority expectations of employees outside the plaintiff class can never be granted. The language of Section 706(g), however, contains no such limitation. In fact, the decisions of this Court support the award of relief far more intrusive than the remedy provided in the preliminary injunction if, as here, a valid remedial purpose is served.[11]

The District Court's prohibition of reductions in the percentage of black employees in specified ranks within the Fire Department was designed solely to preserve the partial attainment of the objectives set forth in the initial version of the 1980 Decree. By shielding certain class members from the operation of the City's lay-off plan, the District Court temporarily protected them from a rigorous application of last-hired-first-laid-off seniority principles. That protection was limited in time to the 1981 Memphis fiscal crisis and directed exclusively to protecting job tenure. Unlike recipients of permanent retroactive seniority in Title VII cases, these class members did not receive increased pension rights or time credited towards promotion. This Court's decisions in *Franks*

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11 The discussion in text assumes *arguendo* that the City maintained a bona fide seniority system as that term is used in Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). Absent a bona fide seniority system, the considerations set forth in *Teamsters* concerning the protection of such systems do not apply. It is by no means clear whether or not the City's lay-off plan, whose terms differ from those of its previous, non-binding (*see City of Alcoa v. International Brotherhood of Electrical Workers Local 760*, 203 Tenn. 12, 308 S.W.2d 476 (1958)) Memorandum of Understanding with the Union, is a bona fide seniority system. Were decision of this factual issue determinative, its resolution should be made first at the trial court level. Resolution of this issue is unnecessary, however, because Respondents would prevail even if the lay-off plan did constitute a bona fide seniority system.

and *Teamsters*, endorsing the wide availability of permanent retroactive seniority, support both the purpose and scope of the more limited relief granted by the District Court in the preliminary injunction.

In both *Franks* and *Teamsters*, defendant employers challenged the availability of an award of class-wide permanent retroactive seniority to successful Title VII plaintiffs. In *Franks*, the Court established a general presumption in favor of granting full retroactive seniority to victims of an employer's discrimination.[12] The Court did not relegate permanent retroactive seniority to the status of rare or extraordinary relief, but instead held that it should ordinarily be awarded unless there was an "unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." 424 U.S. at 779 n.41. While stressing that the design of the appropriate remedy is left to the sound equitable discretion of the district court, the Court admonished that the district court's discretion must be exercised to "allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Id.* at 770-71. *Franks* was primarily concerned with retroactive seniority as a restitutionary "make-whole" remedy. It nowhere limits retroactive seniority to serving exclusively that objective of Title VII, and speaks instead of the "objectives" of the statute.

In *Teamsters*, the Court explicitly validated the employer's seniority system as bona fide, yet reiterated that successful class members were presumptively entitled to permanent retroactive seniority. 431 U.S. at 347. While retroactive seniority in *Teamsters* was sought and granted solely as a matter of

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12 The Court in *Franks* rejected the contention that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), prevents the district court from awarding retroactive seniority. Section 703(h) states that the maintenance of a bona fide (*i.e.*, nondiscriminatory) seniority system does not constitute actionable discrimination. As this Court explained, Section 703(h) merely defines legal and illegal practices under Title VII; it does not impose a limitation on the district court's remedial authority under Title VII. *See* 424 U.S. at 757-62.

"make-whole" relief, the Court emphasized the importance of other remedial objectives of Title VII, stating (in language we have previously quoted) that "the district courts have 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Id.* at 364 (quoting *Moody*, 422 U.S. at 418).

Given (1) the strong presumption in favor of awarding permanent retroactive seniority, (2) the District Court's "duty" to eliminate the present effects of past discrimination, and (3) the deference paid to the court's sound equitable discretion, the preliminary injunction here, which at most temporarily and partially suspended the operation of a seniority program, is not objectionable. The remedial purpose of the 1980 Decree, the elimination of the present effects of past discrimination, was specifically endorsed in *Franks* and *Teamsters*. Those decisions in no way diminish the power and obligation of the District Court to safeguard the efficacy of the relief that it ordered. On the contrary, those decisions approve active pursuit of the prophylactic goals of Title VII, even where, as here, this pursuit may partially disrupt expectations based on seniority. As the First Circuit noted in *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 975 (1st Cir. 1982), *vacated and remanded for a determination of mootness*, 103 S.Ct. 2076 (1983), on facts virtually identical to those presented here, "To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted."

Both *Franks* and *Teamsters* recognize that relief in Title VII cases, including class-wide permanent retroactive seniority, often affects the interests of non-minority employees. *See Franks*, 424 U.S. at 774-79; *Teamsters*, 431 U.S. at 374-76. Yet, as the Court noted in *Franks*,

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

424 U.S. at 775 (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)). In *Teamsters*, this Court stated that it is the responsibility of the trial court to resolve the competing interests. *See* 431 U.S. at 375-76. The very limited and necessary relief contained in the preliminary injunction entails far less intrusion on the interests of nonminority employees than did the award of permanent retroactive seniority authorized in *Franks* and *Teamsters*. The District Court sensitively accommodated the interests and expectations of both class members and nonminority employees in fashioning a decree that does no more than safeguard, for the limited duration of the 1981 layoffs, the progress in affirmative action that had already been made.

Petitioners and their *amici* argue that, because there was no finding of discrimination by the City and no adjudication that each class member protected from lay-offs was a proven victim of discrimination, the District Court lacked equitable discretion to issue a preliminary injunction affecting seniority expectations. These arguments treat the 1980 Decree as a procedural nullity without consequences for the defendants.

A consent decree is a court order embodying an agreement by the defendant to provide the plaintiff class with specified relief. *See United States v. City of Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981) (en banc) (plurality opinion). By agreeing to the 1980 Decree, the City waived its right to insist that the plaintiff class prove the City's commission of discriminatory practices, just as the plaintiff class waived its right to seek greater relief (*e.g.*, full retroactive seniority) from the court. The City, in an effort to defeat the District Court's injunction preserving the remedy agreed upon in 1980, cannot now rely on the absence of a finding which it, by its consent, made unnecessary.[13] A

13 However, the District Court could not have approved the 1980 Decree unless it found that the the decree was fair and equitable in light of the plaintiff's showing of a potential violation. Here, both the District Court and, on appeal, the Sixth Circuit carefully reviewed the 1980 Decree and found it fair and equitable. In granting the preliminary injunction, the District Court explicitly took judicial notice (on the basis of both facts in the record and common public knowledge) that the City was guilty of racial discrimination. (Petitions for Cert., App. at 73-74).

contrary rule would render courts of equity powerless to protect the efficacy of relief ordered by consent and would subject litigants to the protracted litigation that the consent decree was designed to avoid.

The Petitioners also mistakenly insist that the District Court could not issue the preliminary injunction without first determining that each recipient was a victim of the City's discriminatory practices. When full retroactive seniority is sought solely as restitutionary "make-whole" relief, *Franks* and *Teamsters* understandably limit such relief to identifiable victims of the employer's practices. (A non-victim neither seeks nor needs restitution.)

In this case, however, the relief granted was not sought as "make-whole" relief. It was awarded pursuant to the District Court's mandate under Section 706(g) to order appropriate affirmative action and pursuant to its power as a court of equity to preserve the integrity of its decrees. Thus, affirmative action was necessary to protect the remedy (albeit partial) achieved under an earlier uncontested decree designed to eliminate the enduring effects of historic discrimination. *Franks* and *Teamsters* hold that, if a class-wide award of permanent retroactive seniority is necessary to achieve the objectives of Title VII, it should be granted notwithstanding its effect on the seniority expectations of employees outside the class. These cases do not hold that retroactive seniority can *never* be granted to individuals not adjudicated victims of the employer's discrimination. Instead, they commit the scope of relief to the sound discretion of the district court. Given the presumption established by these cases in favor of granting a form of seniority relief far more intrusive than that at issue here, the District Court should not be found to have abused its discretion. After considering the equities, the court acted well within its discretion in approving a remedy that has only a limited and temporary effect on seniority while achieving the unexceptionable purpose of effectuating the court's prior decree.

The requirement of an adjudication that each beneficiary was a victim of discrimination, like the requirement of an

adjudication that the defendant had engaged in discriminatory practices, would effectively prevent courts of equity from moving swiftly to preserve the results that have already been achieved under a Title VII consent decree. Such adjudications would be especially inappropriate in the context of a preliminary injuction, which seeks only to protect the *status quo*, prior to a decision by the District Court on the merits.

Even assuming that such individual adjudications were appropriate, this Court held in both *Franks* and *Teamsters* that such adjudications are not a prerequisite to an initial class-wide award of retroactive seniority. In *Franks*, this Court ruled that class-wide permanent retroactive seniority should be awarded by the district court subject to the employer's right, at subsequent proceedings, to object to the award of retroactive seniority to specific employees on an individual basis. *Franks*, 424 U.S. at 772-73. As an indication of the importance given to providing complete relief, the Court placed the burden of proof in such individual proceedings on the employer. *Id.* at 773 n.32. In *Teamsters*, the Court restated these propositions. 431 U.S. at 359 & n.45.[14] Accordingly, individual adjudications, even where appropriate, should occur only following the entry of class-wide retroactive seniority after a hearing on the merits, and *a fortiori* were not required before the entry of the much more modest relief at issue here. The absence of such adjudications prior to issuance of the preliminary injunction affords no basis for disturbing the District Court's ruling.

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14 In *Teamsters*, the court isolated a single discrete group of plaintiffs, those who had never applied for the position of over-the-road driver, and held that, before they enjoyed the presumption in favor of full retroactive seniority, they first bore the burden of establishing that they would have applied for the position but for the employer's discrimination. *See* 431 U.S. at 367-68. There is no indication that such a discrete group exists here, because all employees benefiting from the preliminary injunction were hired prior to the entry of the consent decree in 1980, *see* Brief for Petitioner Memphis Fire Department, Add. A. The less intrustive form of relief granted in the preliminary injunction cannot justify such segmentation in any event.

CONCLUSION

For the foregoing reasons, MALDEF respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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October 27, 1983